No. 02-322

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In the Supreme Court of the United States

UNITED STATES DEPARTMENT OF THE TREASURY, BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, PETITIONER

v.

CITY OF CHICAGO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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Although respondent characterizes the questions presented here as "highly fact-bound issues of no general significance" (Br. in Opp. 8), this is a case of great legal and practical importance. The court of appeals' Exemption 7(C) analysis conflicts with decisions of this Court and numerous decisions in other circuits, and its ruling compels the release of massive amounts of personal data, without meaningfully furthering the public interest in evaluating ATF's own conduct. See Pet. 11- 19. With respect to Exemption 7(A), the court's decision requiring disclosure of data associated with more than one million firearm traces will impede ongoing criminal investigations throughout the nation, put law enforcement personnel and others at risk, and discourage the creation and use of similar databases by ATF and other federal law enforcement agencies. See Pet. 4 n.1, 11, 24, 28.

Respondent contends (Br. in Opp. 23) that the court's decision will not impair law enforcement activities because ATF may still withhold data associated with any specific

trace request that is shown to be particularly sensitive. That suggestion flies in the face of this Court's specific endorsement of a "generic" or categorical approach to the implementation of Exemptions 7(A) and 7(C), see *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214, 236 (1978); *United States Dep't of Justice* v. *Reporters Committee for Freedom of the Press*, 489 U.S. 749, 776-780 (1989), as well as its more general admonition that the FOIA exemptions are "not to be construed in a nonfunctional way," *John Doe Agency* v. *John Doe Corp.*, 493 U.S. 146, 157 (1989). The petition for a writ of certiorari should be granted.

A. The Court Of Appeals' Decision In This Case Did Not Rest On Deference To District Court Findings Of Fact

Respondent repeatedly contends (*e.g.*, Br. in Opp. 6-7, 8, 21, 26) that this case does not warrant further review because the outcome in the lower courts turned on the resolution of factual disputes. That claim misstates the record.

1. Contrary to respondent's suggestions (*e.g.*, Br. in Opp. 5, 6), the district court did not conduct an evidentiary hearing on the merits of the government's exemption claims. Rather, the evidentiary hearing was limited to the discrete issue of "segregability" (see 5 U.S.C. 552(b); Pet. App. 27a-30a): *i.e.*, whether, if some but not all of the requested information were ultimately held to be exempt from compelled disclosure, the government could feasibly segregate and withhold the exempt information, while releasing any data that were found to be non-exempt. Respondent's counsel stated at the outset that "the scope of the hearing really is to look at whether or not it is feasible and practicable for the Government to make certain deletions assuming the exemptions apply." 1 Tr. 2. Respondent's post-hearing memorandum noted that "a two-day hearing was held where the parties presented evidence *on the narrow issue of segregability*." R. 47, at 2 (emphasis added). No evidentiary hearing was ever held in this case regarding the applicability of any FOIA exemption.

2. The district court issued no findings of fact bearing on the applicability of Exemption 7(A) or 7(C); it granted summary judgment to respondent. See Pet. App. 19a, 30a. Although the court of appeals referred in passing to a "clear error" standard of review in FOIA cases generally, *id.* at 5a, it likewise did not suggest that the district court's disposition of the case turned on the resolution of disputed factual issues, or that its affirmance rested on a deferential standard of review. Rather, the court of appeals' opinion shows that it independently reached the same conclusions as had the district court, based on its own assessment of ATF's submissions. See *id.* at 10a ("we agree with the district court that" Exemption 7(A) is inapplicable); *id.* at 15a ("When one balances the [relevant public and private interests under Exemption 7(C)], the scale tips in favor of disclosure."); see generally *id.* at 7a-10a, 13a-15a. The government's objection to the decisions below has always been that the lower courts applied a fundamentally incorrect legal analysis, not that they erred in determining the relevant facts.

B. ATF Properly Withheld Individual Names And Addresses Pursuant To FOIA Exemption 7(C)

1. *The Privacy Interests Implicated Here Are Substantial*

a. Respondent contends (Br. in Opp. 8-11) that the privacy interests implicated by disclosure of individual names and addresses within the Trace and Multiple Sales Databases are insignificant because commercial transactions in firearms are subject to extensive regulatory oversight. The cases upon which respondent relies, however, address the record-keeping obligations and privacy interests of firearms *dealers* vis-à-vis the federal government. They in no way suggest that

purchasers of firearms have no privacy interest concerning their purchases as against the public at large.

Under the regulatory scheme, the identities of firearms purchasers must be reported *to appropriate governmental authorities* in certain defined circumstances.[1] But because FOIA applies only to federal agency records, Exemption 7(C) would be rendered nugatory if information could be treated as non-private simply because it had been disclosed *to* the federal government. See Pet. 13; compare *Reporters Committee*, 489 U.S. at 770 ("The right to collect and use [personal] data for public purposes is typically accompanied by a concomitant statutory or regulatory duty to avoid unwarranted disclosures.") (quoting *Whalen* v. *Roe*, 429 U.S. 589, 605 (1977)). Respondent's argument also ignores the fact that the Trace Database identifies numerous individuals (*e.g.*, persons found with a weapon's last known possessor at the time the firearm was recovered) who did not purchase the traced gun and therefore cannot be said to have voluntarily subjected themselves to the regulatory regime governing commercial firearms transactions. See Pet. 14.

b. Respondent also contends (Br. in Opp. 12) that public disclosure of individual names and addresses in the Trace Database implicates no meaningful privacy interest because "the information at issue does not identify suspects, wit-

[1] Respondent contends (Br. in Opp. 10) that "multiple purchases must be reported to federal, state, and local authorities, without any statutory restriction on the further dissemination or use of that information." That is incorrect. Under 18 U.S.C. 923(g)(3)(B), state and local law enforcement officials may not disclose multiple sales reports or their contents "to any person or entity, and shall destroy each such form and any record of the contents thereof no more than 20 days from the date such form is received," unless the form relates to a purchaser whose possession of a firearm is prohibited by 18 U.S.C. 922(g) or (n). Section 923(g)(3)(B) also requires state and local authorities to certify to the Attorney General every six months that no improper disclosures have been made and that all forms and records of their contents have been destroyed.

nesses, or even people interviewed in connection with an investigation." That argument is specious. Many of the persons identified in the Trace Database—who include the last known possessors of firearms believed to be connected to crimes, as well as any persons found with them at the time firearms were recovered—are undoubtedly suspects in, or witnesses to, the underlying criminal activities that precipitated the traces, or have been interviewed in the investigations. See Pet. App. 53a-54a. Respondent's theory apparently is that an individual who is publicly associated with a criminal investigation suffers no meaningful incursion on his privacy unless his specific status in the investigation (*e.g.*, as "suspect" or "witness") is expressly referenced on the face of the released document. That theory is contrary both to precedent and to common sense. The pertinent court of appeals decisions (see Pet. 15-16) make clear that *all* persons who may be connected to a criminal investigation have a significant privacy interest in avoiding public disclosure of their involvement. Possible uncertainty as to a particular individual's specific role in a criminal investigation does not reduce the intrusion on privacy that public association with the investigation entails.

2. ***Public Disclosure Of Individual Names And Addresses In The Databases Would Not Further The Public Interest***

a. Respondent contends (Br. in Opp. 16) that its declarant, Gerald A. Nunziato, provided "uncontroverted testimony" that disclosure of "individual names" in the Trace and Multiple Sales Databases could assist the public in evaluating ATF's efforts to enforce federal gun laws. The primary thrust of the cited testimony, however, was that identification of gun *dealers* could aid the public in assessing ATF's

conduct. See R. 38, Exh. O, paras. 26, 28.[2] Although all identifying information concerning firearms dealers is withheld temporarily pursuant to Exemption 7(A), see Pet. App. 54a-58a, ATF has not invoked Exemption 7(C) with respect to that category of data, see *id.* at 62a-69a. Nunziato's testimony is therefore largely irrelevant to the Exemption 7(C) issue presented here.

b. Notwithstanding the established rule that a FOIA requester's intended use of agency records is irrelevant to the balancing of public and private interests under Exemption 7(C), the court of appeals emphasized the City's own interest in enforcing its gun laws and litigating its pending lawsuit against gun manufacturers and dealers. See Pet. 17-18; Pet. App. 14a-15a. Respondent contends (Br. in Opp. 17) that the court's reliance on that interest was proper because assisting state and local enforcement efforts is part of ATF's mission. ATF's assistance of state and local governments has never included releasing sensitive law enforcement information to the public at large, and state and local law enforcement would be seriously undermined by such disclosures. See Pet. 20-21, 24-25. Moreover, respondent does not explain (nor did the courts below) how public disclosure of individual names and addresses could cast light on the agency's conduct in assisting state and local governments. The Benton Declaration (Pet. App. 31a-71a) clearly sets forth ATF's dis-

[2] Nunziato did state, in his second supplemental declaration, that "the City of Chicago has traced over 60,000 crime-guns and has identified over 80,000 names of individuals involved with these crime-guns. The Chicago data could be analyzed to determine if ATF is actively enforcing the Federal firearms laws and regulations." R. 38, Exh. O, para. 27. Nunziato did not explain, however, *how* the names and addresses of purchasers and third parties identified in the Trace and Multiple Sales Databases could be used to evaluate ATF's enforcement of federal gun laws. Moreover, ATF provided respondent with the relevant "Chicago data" as a discretionary release to a local law enforcement agency for its own purposes pursuant to the Gun Control Act of 1968. See Pet. 7, 14 n.8.

closure policies with respect to the Trace and Multiple Sales Databases, including ATF's reasons for withholding the individual names and addresses contained therein. Release of the names and addresses themselves would not help the public to determine whether ATF has adequately supported local authorities, or otherwise to evaluate ATF's performance of its responsibilities. Compare *United States Dep't of Defense* v. *FLRA*, 510 U.S. 487, 497 (1994) ("Disclosure of the [requested] addresses might allow the unions to communicate more effectively with employees, but it would not appreciably further the citizens' right to be informed about what their government is up to.") (internal quotation marks omitted).

C. ATF's Withholding Policies With Respect To The Trace Database Are Appropriate Under Exemption 7(A)

1. Respondent contends (Br. in Opp. 18) that "when trace data is potentially sensitive, it is clearly identified as such and already adequately shielded from release." That is incorrect. Firearm trace requests are occasionally "coded" to alert ATF that a particular retail dealer should not be contacted, and the disclosure obligation imposed by the court of appeals appears to exclude data associated with those "coded" traces. Pet. 20 n.10; see Pet. App. 9a. The coding process, however, is reserved for a small and specific category of traces—*i.e.*, those in which the dealer itself is suspected of unlawful activity. Pet. 20 n.10. The blanket public disclosure of trace data ordered by the court of appeals would compromise ongoing criminal investigations in many other situations where no dealer is suspected of misconduct. See, *e.g.*, Pet. App. 52a-54a (Benton Declaration describes ways in which investigations, including homicide investigations, may be impeded by premature release of trace data).

2. Respondent contends (Br. in Opp. 18) that disclosure of trace results is unlikely to compromise law enforcement interests because traced firearms are "almost always [recovered] as the result of a search of a suspect or arrestee." That assertion has no basis in the record, and ATF informs us that approximately 30% of all trace requests do not associate the weapon with any individual possessor. In those situations, immediate public disclosure of the firearm trace could easily alert the person who abandoned the gun to the fact that law enforcement officials have recovered it, thereby facilitating obstruction of the underlying investigation. See Pet. App. 53a. And even when the recovery of the firearm is known to the person from whom it was seized, and to persons who were with him at the time of the seizure, others involved in the underlying criminal activity could well be unaware that an investigation has commenced or that particular individuals have already been identified in it. Public disclosure of that information could facilitate efforts to impede the investigation by (*e.g.*) intimidation of potential witnesses. See *id.* at 53a-54a.[3]

Respondent also contends (Br. in Opp. 18) that "the tracing process itself destroys whatever confidentiality might remain, because it requires that firearms manufacturers, wholesalers, and retailers be contacted and told that a trace

[3] Respondent asserts (Br. in Opp. 24 n.10) that "ATF has released trace data on numerous occasions to advocacy groups, journalists, and even purchasers," and that the agency identified no harms resulting from those disclosures. Respondent has not contended, however, that the Trace Database has ever been released in its entirety; respondent's district court declarations asserted only that private individuals have occasionally obtained access to the database for brief periods of time, or that isolated data items have previously been released. The government has vigorously contested those contentions. See, *e.g.*, Gov't C.A. Reply Br. 14-15. The district court did not resolve the question, and the court of appeals decided the case on the understanding that "this type of information has never before been released." Pet. App. 18a.

has been requested." But while such persons are *occasionally* participants in criminal wrongdoing, they are scarcely the *primary* threat to the integrity of the underlying law enforcement investigations. Exemption 7(A) is routinely invoked to protect information—*e.g.*, the contents of witness interviews, see *Robbins Tire*, 437 U.S. at 236-242—that is already known to some person or persons outside the government. Moreover, a person who is contacted in the tracing process learns only that a trace has been requested for a particular weapon, not any additional information associated with the trace. Pet. App. 36a. Informing a limited number of regulated entities that a particular trace has been initiated is entirely different from the blanket *public* disclosure—encompassing both the fact of a trace and significant associated data in more than 200,000 criminal investigations each year—that release of the entire database under the FOIA would entail.[4]

3. The petition explains (at 28-29) that the court of appeals' decision is likely to deter federal law enforcement

[4] Respondent also contends (Br. in Opp. 20 n.9) that release of the Trace Database would be unlikely to disrupt law enforcement activities because few criminals would make FOIA requests for firearm trace data, and delays in processing any requests that are submitted would reduce the likelihood of harm. Those arguments are misconceived. If (as the court of appeals held) the computerized records at issue here must be released to every requester, the prospect that the databases will be quickly posted on the Internet, with consequent widespread public exposure, is entirely realistic. ATF's predictions of likely harm to criminal enforcement efforts are therefore not dependent on a plethora of follow-on FOIA requests by individuals who might seek to impede the underlying criminal investigations. In any event, this Court, in applying the various FOIA exemptions, has not previously speculated as to the likelihood that repetitive FOIA requests would be filed, or as to the length of time that such requests would take to process. Rather, the Court has simply assumed that records held to be subject to compelled public disclosure would enter the public domain, and has asked whether public scrutiny of the relevant categories of requested records could be expected to cause the harms the exemption is designed to prevent.

agencies from utilizing comprehensive databases, and to discourage state and local agencies from submitting firearm trace requests. Respondent disputes those predictions, contending (a) that "the holding below leaves ATF free to claim Exemption 7(A) for specific traces in future litigation by showing that they contain sensitive information about a particular ongoing investigation" (Br. in Opp. 23), and (b) that if a requesting agency "has a real concern about disclosure of the results of [a] particular trace request, * * * [it] need only apprise ATF of the reason that the trace is sensitive" (*id.* at 25).

The approach to FOIA implementation that respondent advocates, under which the applicability of Exemption 7(A) would be determined on a trace-by-trace basis, wholly disregards this Court's holding in *Robbins Tire* and the practical concerns that underlay that decision. The Court made clear in *Robbins Tire* that withholdings under Exemption 7(A) need not be premised on document-specific showings of likely harm, but may instead be based on "generic determinations" regarding "particular *kinds* of enforcement proceedings" and "particular *kinds* of investigatory records." 437 U.S. at 236 (emphasis added); see Pet. 22. And because the Trace Database contains data associated with more than 1.2 million firearm traces, it would have been entirely infeasible for ATF, in processing respondent's FOIA request, to have conducted an individualized inquiry to determine which particular trace results could and could not be safely disclosed. See Pet. 23.

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For the reasons stated above, and in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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